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U.S. Citizenship and Immigration Services

[redacted] PUBLIC COPY

JUN 01 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The approval of the employment-based immigrant visa petition was revoked by the Director, California Service Center. The director reopened the matter and reaffirmed his decision on appeal. The matter is now before the Administrative Appeals Office on an appeal of the director's second decision. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

On April 30, 2003, the director issued a notice of intent to revoke. The petitioner responded to this notice, through counsel, on May 29, 2003. In his final decision, dated June 25, 2003, the director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability and exercised his discretion to revoke approval of the petition. While the cover page of this decision, Form I-292, is entitled "Notice of Decision" and the appellate period is provided as 30 days, the final paragraph of the decision states that the approval of the petition is revoked as of the date of approval. Thus, the decision is clearly a revocation, not a denial.

On July 14, 2003, the petitioner filed the first appeal, asserting that the proper procedure is revocation, not denial. On December 9, 2003, the director reopened the matter, indicating that the June 25, 2003 notice was a revocation but was issued attached to the wrong Form I-292. The director then reissued the notice, with the same concluding paragraph, attached to an identical Form I-292 providing for the same appellate period.

In the instant appeal, counsel asserts that the director wrongfully reopened the matter and should have forwarded the matter to this office since it was not issuing a favorable decision. Counsel asserts that she will submit a brief and/or additional to this office within 30 days. The director received the appeal on January 12, 2004. As of this date, more than three months later, we have received nothing further. Thus, we will adjudicate the instant appeal on the record of proceedings.

We acknowledge that 8 C.F.R. § 103.3(a)(2)(iii) permits the director to treat an appeal to this office as a motion to reopen only where it intends to issue a new decision favorable to the petitioner. However, 8 C.F.R. § 205.2(d) states that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. The director's notice of decision erroneously stated that the petitioner could file an appeal within 33 days. Nevertheless, the director's error does not supersede the pertinent regulations. Thus, the petitioner's initial appeal was not timely filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen as described in 8 C.F.R. § 103.5(a)(2), or the requirements of a motion to reconsider as described in 8 C.F.R. § 103.5(a)(3), the appeal must be treated as a motion, and a decision must be made on the merits of the case. As the initial appeal was untimely filed, the director correctly treated the appeal as a motion and issued a new decision.

While the new decision inexplicably uses the exact same Form I-292 as the initial decision, we find that both notices are unambiguously final revocations. The petitioner, through counsel, was aware of the notice of intent to revoke and, in fact, responded to that notice. Both final notices reference the notice of intent to revoke and indicate, in the closing paragraph, that the approval is revoked as of the date of approval. As such, the petitioner has not been denied any procedural rights.

Regarding the merits of the director's decision, counsel states only that the director's decision is contrary to the evidence and based on unsubstantiated speculation and prejudice. As will be discussed in more detail below, while we find that the director improperly dismissed as insignificant some of the evidence, we concur with the director's ultimate concern, more clearly articulated at the end of the notice of intent to revoke, that the petitioner's recent employment history is not consistent with *sustained* acclaim or her intent to continue working in her field of expertise.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> (A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --
>
> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Citizenship and Immigration Services (CIS) regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that she has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a singer, composer, and performer. The petitioner was a member of the Filipino pop group Prettier Than Pink. The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. The petitioner has submitted evidence that, she claims, meets the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner claims to meet this criterion based on the Gold Record status achieved by one of Prettier Than Pink's records and two nominations for AWIT awards in 1996 and 1998. The petitioner submitted a photograph of the Gold Record placard and a letter from Alwyn Bruz, Label Manager for Neo Records, asserting that records are certified gold in the Philippines after selling 20,000 copies. [redacted] President of the Philippine Association of the Record Industry, Inc., confirms that Prettier Than Pink was a finalist for the 1996 AWIT award for Best Performance by a New Duo or Group Recording Artists and the 1998 AWIT award for Best Pop Recording. Mr. [redacted] asserts that the AWIT Awards are equivalent to the U.S. Grammy Awards.

In his notice of intent to revoke, the director concluded that the awards were group awards and that the petitioner had not established that the awards are international or national awards for excellence. In response, counsel asserted that the petitioner was the leader of the group and that her songwriting efforts led to the nominations. In his final decision, the director focuses more on the petitioner's failure to make a living as a musician in recent years.

Regarding Gold Record certification, we note that the certification appears based on record sales alone. As such, it is not a competitive award for excellence. Rather, we find that this evidence is better considered under the commercial success criterion discussed below.

A prize awarded to more than one awardee is not necessarily problematic. While an award conferred upon a large symphony might not reflect the national or international acclaim of each member, a Grammy or equivalent award conferred upon all members of a small group (where each member receives a statue) is indicative of each member's recognition in the field. Thus, we do not share the director's concern that the AWIT award nominations named the petitioner's group. More problematic is the fact that the petitioner was not the recipient of the AWIT awards, but was merely a finalist. The regulation requires documentation of the alien's receipt of the prize or award, not merely nomination for the prize or award. The record contains no evidence regarding how many groups were nominated or the national recognition afforded nominees. For example, the record contains no evidence that the nominations themselves are widely reported in the press. Regardless, while a coveted nomination for a prestigious award such as an Academy Award or Grammy may properly be accorded some weight, a nomination can never be accorded as much weight as winning the award itself.

Finally, the director's discussion of the petitioner's recent failure to work in her field suggests the director's ultimate concern, albeit not directly expressed, was that the petitioner has not demonstrated sustained acclaim, as required by the regulations. We note that the petitioner's final award nomination was in 1998, more than three years prior to the filing date of the petition. Thus, even if we found that the petitioner meets this criterion, in order to demonstrate sustained acclaim, the petitioner would need to provide some evidence consistent with acclaim more proximate to the date of filing.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

The petitioner submitted certification that she is a member of the Organisasyon ng Pilipinong Mang-aawit (OPM) and the Filipino Society of Composers, Authors and Publishers, Inc. [redacted] President of OPM, provides no information regarding the membership requirements for OPM, asserting only: "As a professional performing artist, she is a contributor to the upliftment of the music and the entertainment industry in the Philippines." [redacted] General Manager for the society, asserts that it is a "non-profit association of composers, lyric

writers and music publishers established in 1965 to administer the performance and mechanical reproduction rights granted by law to creators and owners of original musical works." She does not indicate what the membership requirements are.

In his notice of intent to revoke, the director concluded that the evidence did not establish that membership "is solely limited to those who have gained outstanding achievement." Rather, the director characterized the membership as "voluntary." Noting that the Philippines is a free country, counsel questioned the director's use of the term "voluntary." Counsel notes that the memberships are "professional" and concludes that since making a living in the music industry is so difficult, membership in a professional association in the music industry requires outstanding achievements. Counsel references information in the Internet version of the Occupational Outlook Handbook to support her argument.

In his final decision, the director quoted the definition of "professional" and concluded that it was not synonymous with outstanding. We concur with this conclusion. This office has consistently held that membership in an association requiring experience in a field, even associations in a competitive field such as entertainment (such as the Screen Actors' Guild), cannot serve to meet this criterion. An ability to work in one's field, even a competitive field, is not an outstanding achievement.

> *Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

The petitioner submitted 51 articles, press releases and advertisements relating to Prettier Than Pink in the Filipino media. While the record includes two press releases from January 1999 and one from February 1999, most of the coverage is from 1996 through 1998. The petitioner also submitted four articles in local or Asian-American media relating to the petitioner's performance in a church musical.

In his notice of intent to revoke, the director concluded that the articles did not establish the petitioner's role in the group's success and that the petitioner had not demonstrated that the articles appear in newspapers or magazines that were "major publications as well as international in scope." In response, counsel references letters from band members attesting to the petitioner's role in Prettier Than Pink, noting that other members "came and went." In his final decision, the director questions the content of the articles, stating:

> In fact, most of the publications also [include] other musical groups that will be appearing on the same bill with the petitioner's group '[P]rettier [T]han [P]ink[.]'
>
> Entertainment rags would mention appearances of the musical group, this is what their business is all about. Every musical group will have a promotional manager. Again, this is what the manager is paid to do – "keep the group in the public eye[.]" Performing in 'malls' and the 'bar circuit' does not require a musical group that is extraordinary/outstanding.

The director attempts to denigrate any published material in entertainment magazines, characterizing them as "rags" and implying that the coverage is the result of having a manager. Such a broad dismissal of coverage in entertainment media is problematic. While it is certainly a manager's responsibility to promote her clients, independent journalistic coverage of a group in major media, including entertainment media, can be indicative of national recognition.

Nevertheless, we agree with the director that much of the "published material" consists of advertisements that include other bands, captioned pictures, and press releases that, due to their identical wording in different publications and lack of byline, are not the result of independent journalistic coverage. That said, the media coverage does include some articles that focus solely on Prettier Than Pink. The record contains the 1996 article "Keeping things cool with Prettier Than Pink" by Michelle Diotay and Celeste Odono and published in *Mr. And Ms.*, the 1998 article "PTP kicks back!" by Renz Tuzon and published in *Starnews Mag,* the 1998 interview with the group by RJ Baliza in *Channels*, and an undated interview mostly in Tagalong (submitted without a translation) entitled "The return of Prettier Than Pink" by Mhike Aragon in *Smash.* In addition, a few of the articles that lack bylines are full-length articles that were accepted for publication, such as the 1996 "A 'cool' reminder from Prettier Than Pink" in *The Philippine Star.* While not carrying the same weight as independent journalist coverage, they are notable.

While the director erred in implying that the petitioner must demonstrate the international circulation of these publications, it is an element of the criterion that the published material appear in major media. The record contains no evidence of the circulation of these publications or any of the other publications. Thus, the petitioner has not established that these articles and the interview appeared in major media with a national circulation.

Regardless, Filipino coverage of the group, including the press releases, appears to have ended in February 1999, nearly three years prior to the date of filing. As the final interview in *Smash* is undated, independent journalistic coverage of the group may have ended in August 1998. Thus, even if we concluded that the petitioner meets this criterion, she would need to demonstrate evidence indicative of acclaim more proximate to the date of filing.

As stated above, the record does include press releases, an advertisement, and an article published in 2000 in *Lifestyles, USA Asia Today, Asian Examiner,* and *Tribune U.S.A.* relating to a production of the musical drama "Once Upon a Cross" performed by the Aldeguer Sisters Events Management at the Museum Plaza in Los Angeles. While the advertisement and the press release mention the petitioner as being in the cast, the articles cannot be said to be "about" the petitioner by any definition of the word. Moreover, the record contains no evidence that these publications constitute major media in the United States. Thus, the petitioner has submitted no evidence relating to this criterion indicative of acclaim proximate to the date of filing.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

Mr. [redacted] asserts that the petitioner was "consistently invited to be a member of the AWIT AWARD's Screening Committee for nominees to the various categories." In his notice of intent to revoke, the director noted the lack of evidence regarding the criteria to serve on the committee or establishing that "those judged were of extraordinary ability." In response, counsel argues that the director impermissibly raised the standard above that stated in the regulations.

CIS may evaluate the evidence submitted to meet a given criterion as to whether it is indicative of or consistent with national or international acclaim. For example, all members of the Academy of Motion Pictures Arts and Sciences vote on the nominees for Academy Awards. Thus, this office consistently holds that voting on the nominees is not sufficient to meet this criterion. The single statement from [redacted] which does not provide specific dates, duties, and requirements for committee membership, cannot serve to meet this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Initially, counsel asserted that Prettier Than Pink's two compact discs served as evidence to meet this criterion. The director noted that the compact discs were a collaborative effort, acknowledged that the petitioner's compositions were original but concluded that "not every contribution represents a contribution of major significance." In response, counsel focuses only on the director's statement that the compact discs were a collaborative effort, noting that two band members have attested to the petitioner's leading role in the group and arguing that under the director's reasoning, members of the Beatles would not be considered to have made significant contributions. In his final decision, the director questions why band members would have left the group if it remained successful but ultimately determines that the record lacks evidence that the band was successful for any length of time.

We concur with counsel that a member of a music group can make a contribution of major significance. That said, we cannot conclude that every composer of a hit song has made a contribution of major significance. While we questioned the director's presumption that band members do not leave a successful band, the record lacks evidence that Prettier Than Pink has influenced the sound of pop music within the Philippines or internationally.

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

Counsel initially asserted that the petitioner meets this criterion through her performances on MTV Asia, a Filipino variety show and at local venues. The supporting evidence consists of certification from the Editorial Advisor of MTV Asia's Philippines Representative Office, the Production Manager of the variety show and the Production Supervisor of the Manila Broadcasting Company. In his notice of intent to revoke, the director determined that the evidence did not establish the display of the petitioner's individual work. In response, counsel argues that the petitioner repeatedly appeared on major television programs. In his final decision, the director concluded that the evidence was insufficient as it did not establish the ratings of the shows on which the petitioner appeared, the time of day the appearances were aired, or the length of time her appearances lasted.

Before considering the evidence, we note that this criterion relates to visual artists and is not applicable to the petitioner's field. Thus, we must consider whether the petitioner's performances are comparable to the type of exclusive artistic exhibitions and showcases acceptable for visual artists. The certifications indicate that the petitioner appeared an unspecified number of times on the variety show and twice on MTV Asia in 1997 and 1998 to promote Prettier Than Pink's two albums. The certifications do not clearly specify that the band performed. Rather, at least one MTV guest appearance involved an interview. An interview is more akin to the published material criterion discussed above than a display at an artistic exhibition or showcase. Thus, the director's concerns that the record lacked evidence of the details of these performances are reasonable. While MTV is clearly a recognizable name, it does not follow that every program on the network is the equivalent of an exclusive artistic exhibition or showcase. Without more evidence regarding the nature of the program on which the petitioner appeared, we cannot conclude that these appearances can serve to meet this criterion. As with the other evidence of record, we note that the petitioner's last television appearance was in 1998, at least three years prior to filing the petition.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

Initially, counsel relied on the petitioner's television appearances, Prettier Than Pink's gold record status, the use of one of the petitioner's songs in a movie, and an advertisement for the Pleasure Island bar featuring Prettier Than Pink. In his notice of intent to revoke, the director simply asserted that the evidence did not meet this criterion. In response, counsel discusses the prestige of MTV Asia, the petitioner's appearances on that network and the variety show, and the gold record status of Prettier Than Pink's single "Kool Ka Lang." In his final decision, the director concluded that the record did not establish that the petitioner is at the pinnacle of her field.

This criterion has two elements. The first is the nature of the role, and whether it was leading or critical. The second is whether the organization for which the petitioner performed has a distinguished reputation. Appearing as a guest is not a leading or critical role for MTV Asia or the network that broadcast the variety show. While the petitioner has played a leading or critical role for Prettier Than Pink, the record does not establish that the group has a distinguished reputation nationally. The record contains no information regarding the success of the film that included the petitioner's song. While we acknowledge that the group has had some exposure and put out a single that sold enough copies to be certified gold, the evidence does not establish that they enjoyed a distinguished reputation. As discussed above, the petitioner has not established the nature of Prettier Than Pink's television appearances and it appears that despite putting out two albums, only one went gold. The record does not demonstrate the type of track record of success that can be expected of groups with a distinguished reputation.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

As evidence to meet this criterion, the petitioner submitted two record contracts. The director noted the lack of evidence that the remuneration in this contract was significantly high in relation to others in the field. In response, counsel reiterates that the petitioner is the songwriter and lead singer of the group and references the record contracts. In his final decision, the director noted the lack of evidence establishing the amount of royalties received by the petitioner. We concur with the director that the record lacks evidence that the terms of the petitioner's record contract reflect a significantly high remuneration in the petitioner's field in the Philippines.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

As stated above, Prettier Than Pink's 1995 single, "Kool Ka Lang," was certified gold after selling 20,000 copies. The director questioned the petitioner's contribution to this accomplishment. In response, counsel notes that the record contract identifies the petitioner as the songwriter.

As with the other criteria, we do not find that the petitioner's membership in a group detracts from the fact that her song was certified gold. Gold certification is based on record sales and is indicative of commercial success. We note, however, that the song was issued in 1995 according to the letter attesting to its gold certification, and there is no indication when the sales peaked. Thus, while we find the evidence sufficient to meet this criterion, the overall record does not establish the petitioner's sustained acclaim up until the date of filing, six years after the single was released. In his notice of intent to revoke, the director specifically stated that the record demonstrated that the petitioner had "not sustained national or international acclaim," followed by a discussion of the petitioner's current employment in another field. We find the director's concern to be reasonable and note that counsel's response does not address it.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished herself as a singer and composer to such an extent that she may be said to have achieved *sustained* national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner shows talent as a singer and composer, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

Finally, 8 C.F.R. § 204.5(h)(5) provides:

> *No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary *detailing plans* on how he or she intends to continue his or her work in the United States.

(Emphasis added.) The petitioner submitted a personal statement indicating her intention to continue as composer of popular songs, musicals, plays and films, but providing no detailed plans as to how she might accomplish that goal. The record includes no letters from prospective employers or prearranged commitments with record labels or musical or film directors or producers. As noted by the director, the petitioner worked as an accountant from November 1999 through December 2000 and as a loan officer from February 2001 through the time of filing the Form I-485 Application to Register Permanent Resident or Adjust Status. While the director raised this concern in his notice of intent to revoke, counsel did not address it.

In view of the above, the director properly exercised his discretion to revoke approval of the petition under section 205 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.